Hearing Date: April 20, 2016
at 10:00 a.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: CONGREGATION ACHPRETVIA TAL CHAIM SHARHAYU SHOR, INC., Debtor.	Chapter 11 Case No.: 16-10092 (MEW)
163 EAST 69 REALTY, LLC Plaintiff, -against- CONGREGATION ACHPRETVIA TAL CHAIM SHARHAYU SHOR, INC., A New York Religious Corporation, Defendant.	Supreme Court Index No. 161573/2015 Dist. Court Case No. 1:16-cv-01666- VM Adv. Proc. No. ___________ (MEW)

MOTION OF 163 EAST 69 REALTY, LLC TO DISMISS CHAPTER 11 CHAPTER 11 CASE, OR, IN THE ALTERNATIVE, TO ABSTAIN FROM HEARING ACTION REMOVED FROM STATE COURT AND TO REMAND THAT ACTION BACK TO STATE COURT

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163 East 69 Realty, LLC ("**Purchaser**"), by its attorneys, Cozen O'Connor, as and for its motion (the "**Motion**") for an order, substantially in the form annexed hereto as **Exhibit "A"**, (i) dismissing the above-captioned chapter 11 case (the "**Case**") filed by Congregation Achpretvia Tal Chaim Sharhayu Shor, Inc. (the "**Debtor**") for cause, pursuant to section 1112(b) of title 11 of

the United States Code (the "**Bankruptcy Code**"), or in the alternative abstaining, pursuant to 28 U.S.C. § 1334(c)(1) and (c)(2), from hearing the proceeding originally commenced in the Supreme Court of the State of New York (the "**State Court**") and entitled 163 East 69 Realty v. Congregation Achpretvia Tal Chaim Sharhayu Shor, Inc., a New York Religious Corporation, bearing index number 161573/2015 and, since its removal by the Debtor, bearing District Court Case No. 1:16-cv-0166-VM (the "**State Court Action**") and remanding, pursuant to 28 U.S.C. § 1452(b), the State Court Action back to State Court, respectfully represents as follows:

INTRODUCTION

1. The Debtor's Case must be dismissed. It is a classic bad-faith filing by a non-operating debtor based on a two-party dispute. The Case was admittedly filed in order to remove to this Court a pending state court action commenced by the Purchaser for specific performance of a pre-petition contract for the sale of the Debtors' vacant building (its sole asset), located at 163 East 69th Street, New York, New York (the "**Building**"). The Debtor's schedules[1] value the Building at $18 million. The *total* scheduled debt in this Case is $472,502.39.

2. Prior to the filing of the Case, the Purchaser had obtained, in an order to show cause (the "**OSC**") which included a temporary restraining order (the "**TRO**") from the State Court. The TRO, *inter alia*, enjoined the Debtor from selling or taking steps or acts to sell the subject property to any other purchaser. The OSC also scheduled a hearing for January 19, 2016 to consider, among other things, the issuance of a preliminary injunction and the entry of an order directing the Debtor to commence an action in the State Court "seeking the State Court's and/or

[1] The Debtor filed its schedules of assets and liabilities (the "**Schedules**") together with its voluntary petition on January 15, 2016 [Docket No. 1].

the New York State Attorney General's approval of the sale of the [subject premises]" to the Purchaser.

3. The Debtor, faced with an impending hearing before the State Court, commenced this Case by filing a voluntary petition on January 15, 2016 (the "**Petition Date**"), just four days prior to the scheduled hearing before the State Court. Although the bankruptcy filing stayed the January 15, 2016 hearing, the TRO remains in effect. Despite the continued existence of the TRO, the Debtor announced at the initial case conference held before this Court on March 3, 2016 (the "**Initial Case Conference**"), that there was a $14 million offer from an undisclosed third party to purchase the Building and that the Debtor's proposed special real estate counsel was in the process of finalizing a contract in connection with that offer.

4. With the exception of one creditor which loaned the Debtor $250,000 on the eve of the Petition Date, there are only four general unsecured creditors with claims totaling $12,502.39. One of those creditors is the Debtor's former counsel with a disputed claim of $11,166.00. The Debtor also scheduled a disputed secured claim in the amount of $210,000 by Mautner-Glick, Corp. ("**Mautner-Glick**"). Mautner-Glick is owned and/or controlled by the Debtor's one-time director, Alvin Glick. There is no evidence or suggestion whatsoever that any of the secured or unsecured creditors was exerting any financial pressure on the Debtor during the period leading to the filing of this Case.

5. The Debtor, however, faced a hearing before the State Court that could have resulted in an order directing it to commence an action seeking State Court approval or the approval of the New York State Attorney General (the "**NYAG**") approving the sale of the Building to the Purchaser. The Debtor, therefore, filed its voluntary chapter 11 petition (the "**Petition**") with the

express intention of removing the matter to this Court, rejecting the Contract and seeking permission to sell the Building to another party.

6. Indeed, the Debtor, on or about March 4, 2016, filed with the State Court a notice of removal of the State Court Action and the litigation has been assigned a docket in the United States District Court for the Southern District of New York. Upon information and belief, the action has not yet been referred to this Court pursuant to the terms of the Amended Standing Order of Reference of the Hon. Loretta A. Preska, dated January 31, 2012. The Debtor also announced at the Initial Case Conference that it was negotiating a contract for the sale of the Building to an undisclosed third party.

7. As for what the Debtor hopes to accomplish in this Case, it is telling that at the Initial Case Conference, in response to the Court's inquiry, the Debtor's counsel could not articulate what happens to any surplus after the Building is sold and creditors are paid in full. Perhaps one of the reasons is that there would be no surplus. To the extent that the Building is sold for more than the Contract purchase price, the Purchaser would have a rejection damage claim in that same amount.

8. While it may not be clear who benefits from any surplus, what is clear is that the Debtor's two remaining directors are both financially benefitting from the commencement of this Case. Although the Debtor had not paid any moneys to its directors for at least the last two years prior to the Petition Date, the two directors are each now being paid $7,500.00 per month for doing essentially nothing.

9. It is clear from the foregoing that the Debtor, in bad faith, has engaged in forum-shopping and filed this Case not out of any intention to reorganize, but rather to have its two-party dispute with the Purchaser heard before this Court and to sell the Building to another purchaser.

RELEVANT FACTS

10. On or about March 26, 2014, the Debtor and the Purchaser entered into a contract (the "**Contract**") whereby the Debtor agreed to sell and the Purchaser agreed to purchase, the Building. A copy of the Contract is annexed hereto as **Exhibit "B"**.

11. The Debtor had previously used the Building to conduct services as a synagogue. Services are no longer being held at the Building, which is now vacant.

12. The purchase price under the Contract was $9.75 million and the Purchaser paid a Contract deposit in the amount of $487,500.00 into escrow.

13. The Contract called for a closing on the purchase and sale transaction "on or about sixty (60) days from the date that Purchaser's attorney received a copy of all necessary approvals from the Supreme Court of the State of New York and the approval of the New York State Attorney General authorizing the sale of the [Building] pursuant to the terms of this Contract." (Contract ¶ 7).

14. Paragraph 29(e) of the First Rider to the Contract required the Debtor to promptly seek the necessary approvals from the State Court and the NYAG "promptly after execution" of the Contract.

15. After eighteen months had passed and the Debtor had still not applied for the necessary approvals, the Purchaser commenced the State Court Action seeking specific performance. A copy of the complaint (the "**Complaint**") is attached hereto as **Exhibit "C"**.

16. The Debtor filed an Answer on December 8, 2015. A copy of the Answer is annexed hereto as **Exhibit "D"**.

17. On December 23, 2015, the Purchaser sought entry of the OSC and TRO. A copy of the Affirmation (without exhibits) filed by the Purchaser in support of its request for the OSC

and TRO is annexed hereto as **Exhibit "E"**. The Purchaser also submitted a memorandum of law in support of its application. A copy of the memorandum of law is annexed hereto as **Exhibit "F"**.

18. On December 24, 2015, the State Court entered the OSC and TRO, a copy of which is annexed hereto as **Exhibit "G"**.

19. The TRO enjoined and restrained the Debtor from "taking any steps and/or actions to sell the [Building] to any third party or entity, and/or from transferring, assigning, alienating or in any way encumbering the [Building]." The TRO remains in effect.

20. The OSC scheduled a hearing for January 19, 2016 to consider, *inter alia*, entry of a preliminary injunction in sum and substance identical to the TRO and entry of an order "directing [the Debtor] to commence an action in this Court seeking the Court's and/or the New York State Attorney General's approval of the sale of the [Building] as the [Building] is owned by a religious corporation."

21. On December 28, 2015, the Debtor filed an Amended Answer and a Third Party Summons and Complaint. A copy of each are annexed hereto as **Exhibit "H"** and **Exhibit "I"** respectively.

22. On January 8, 2016, the Debtor filed papers in opposition to the relief sought in the OSC.

23. On January 14, 2016, the Purchaser filed an affirmation in reply.

24. On January 15, 2016 – four days prior to the hearing in State Court – the Debtor filed a voluntary chapter 11 petition in this Court.

25. On or about March 4, 2016, the Debtor filed the Notice of Removal of the State Court Action with the State Court. A copy of the Notice of Removal is annexed hereto as **Exhibit "J"**.

26. The following salient facts have either been admitted by the Debtor or cannot be credibly disputed:

- The Debtor commenced this Case in order to remove the State Court Action, (See ¶ 3 of the Affidavit Pursuant to Local Rule 1007-2 [Docket No. 2] attached hereto as **Exhibit "K"** (the "**1007-2 Affidavit**"); TrICC[2] 6:9 – 6:24, 10:15 – 11:16, 12:13 – 12:16);

- The Debtor, a former synagogue, has not operated since February of 2014 (See TrICC 11:10 – 16; Tr341[3] 11:11 – 11:19, 44:20 – 44:23, 45:25 – 46:20);

- The Building has been gutted and currently sits empty with no power or utilities (See Tr341 46:24 – 47:11);

- Despite not operating, the Debtor is paying each of its two directors, Harold Friedlander and Eve Kreger[4] (collectively, the "**Directors**") a "salary" of $7,500.00 per month with funds it borrowed just prior to filing its bankruptcy petition (See 1007-2 Affidavit, ¶ 13; Tr341 19:14 – 28:9);

- The justification for the Directors' salaries is that they personally need the money, not that they are currently performing any services to the Debtor (See Tr341 90:19 – 92:6)

- The monthly "salary" is more than four times the $450.00 weekly salary Mr. Friedlander earned while actually performing services for the Debtor when it was still operational in January, 2014 (See Tr341 89:11 – 92:6);

- The entity which loaned the Debtor the funds described above, 69th Street Capital, LLC, is owned and/or controlled by Fairway Capital Partners ("**Fairway**") or its principal(s) (Tr. 341 19:14 – 20:25);

- Fairway is a private real estate investment company specializing in opportunistic real estate investments, including the acquisition of real estate assets (See website printout annexed hereto as **Exhibit "L"**);

- Fairway assembled and has funded the Debtor's legal team (See Tr341 62:14 – 63:25).

- Shortly before the Debtor's commencement of this Case, Fairway provided a no-interest $250,000 unsecured loan to the Debtors for the purpose of paying the Debtor's professionals and the Directors (Tr341 19:14 – 20:13, 21:4 – 22:25, 37:24 – 38:14, 39:12 – 40:4);

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[2] Numerals preceded by "TrICC" refer to pages and line numbers in the transcript of the Initial Case Conference annexed hereto as **Exhibit "M"**.

[3] Numerals preceded by "Tr341" refer to pages and line numbers in the transcript of the Section 341 meeting of creditors annexed hereto as **Exhibit "N"**.

[4] Mr. Friedlander and Ms. Kreger are brother and sister.

- Other than the debt to Fairway, the Debtor's schedules reveal the existence of only 4 general unsecured creditors, with claims totaling $12,502.39;
- Of those four scheduled general unsecured creditors, one, the Law Offices of Henry Kohn, Esq. (the Debtor's former attorney), accounts for $11,166.000 of the non-Fairway general unsecured claims pool;
- The Debtor is solvent and would have more than sufficient funds to pay its creditors in full if it were to close on the sale of the Building to the Purchaser under the terms of the Contract (See Tr341 43:24 – 44:11, 70:11 – 71:70);
- There was no pre-petition financial pressure from any creditor on the Debtor to seek chapter 11 protection;
- Other than the Contract, there are no executory contracts which need to be administered through bankruptcy;
- The Debtor has only $210,000 in scheduled secured debt against the Building which the Debtor values at $18 million; and
- Other than the Debtor's two Directors, the Debtor has no employees (See 1007-2 Affidavit, ¶ 12).

ARGUMENT

A. THE CASE SHOULD BE DISMISSED AS A BAD FAITH FILING

27. This Case was clearly not filed with the intent or need to reorganize. Instead, it is a classic case of forum-shopping in a two-party dispute. The Case was filed as a litigation tactic in a bad faith effort to ameliorate any potential for an adverse ruling from the State Court. It is also an attempt by a distressed real estate asset acquisition firm – a firm that had no claim against or interest in the Debtor until shortly before the bankruptcy filing – to control the disposition of the Building by funding the ill-conceived chapter 11 filing, by assembling and funding the Debtor's legal team, and by paying off each of the Debtor's Directors in the form of $7,500 per month "no-show" jobs.

28. Section 1112 of the Bankruptcy Code provides that a chapter 11 case may be dismissed "for cause." Subsection (b)(1) thereof provides as follows:

> Except as provided in paragraph (2) of this subsection, subsection (c) of this section, and section 1104(a)(3), on request of a party in interest, and after notice and a hearing, absent unusual circumstances specifically identified by the court that establish that the requested conversion or dismissal is not in the best interests of creditors and the estate, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, if the movant establishes cause.

11 U.S.C. § 1112(b)(1).

29. It is well-settled that "cause" for dismissal purposes includes a filing made in bad faith. *In re C-TC 9th Avenue Partnership v. Norton Movant (In re C-TC 9th Ave P'ship)*, 113 F.3d 1304, 1310 (2d Cir. 1997); *see also Baker v. Latham Sparrowbush Assoc. (In re Cohoes Indus. Terminal, Inc.)*, 931 F.2d 222, 227-28 (2d Cir. 1991); *In re SGL Carbon Corp.*, 200 F.3d 154, 160-61 (3d Cir. 1999) (compiling cases); *In re Schur Management*, 323 B.R. 123, 126 (Bankr. S.D.N.Y. 2005).

A. The Case Was Filed as a Litigation Tactic

30. Courts have routinely dismissed bankruptcy cases on bad faith grounds where the bankruptcy cases were filed as a litigation tactic. *See e.g. In re SGL Carbon Corp.*, 200 F.2d at 165 ("Similarly, because filing a Chapter 11 petition merely to obtain tactical litigation advantages is not within 'the legitimate scope of the bankruptcy laws,' courts have typically dismissed Chapter 11 petitions under these circumstances as well.") (internal citations omitted); *In re Reyes*, 2015 Bankr. LEXIS 2575, *14 (Bankr. S.D.N.Y., Case No. 14-13233 (SMB), August 4, 2015) ("As a general rule where, as here, the timing of the filing of a Chapter 11 petition is such that there can be no doubt that the primary, if not sole, purpose of the filing was a litigation tactic, the petition may be dismissed as not being filed in good faith"); *Y.J. Sons Co., Inc. v. Anemone, Inc. (In re*

Y.J. Sons & Co., Inc.), 212 B.R. 793, 804 (D. N.J. 1997) ("The dismissal of a bankruptcy petition is appropriate if the debtor has filed a petition merely as a forum shopping device to avoid having to appeal a state court decision").

a. The Case Was Filed to Avoid Specific Performance Litigation

31. Where, like here, debtors file bankruptcy petitions to avoid specific performance litigation, bad faith will be found. *See In re The Bal Harbour Club, Inc.*, 316 F.3d 1192 (11th Cir. 2003) (affirming dismissal, on bad faith grounds, of chapter 11 petition where it was filed in order to avoid a prepetition contract to sell real property); *Dixie Broadcasting, Inc. v. Radio WBHP, Inc. (In re Dixie Broadcasting, Inc.)*, 871 F.2d 1023, 1027-28 (11th Cir. 1989) ("It seems clear that Dixie entered bankruptcy to get out of its bad deal … The Bankruptcy Code is not intended to insulate financially secure sellers or buyers from the bargains they strike. Thus, we hold that the bankruptcy court's … conclusion as to bad faith for this purpose was correct as a matter of law"); *Shell Oil Company v. Waldron (In re Waldron)*, 785 F.2d 936, 938 (11th Cir. 1986) (finding dismissal of chapter 13 petition on bad faith grounds warranted where purpose of bankruptcy filing was "to breach the option agreement [for sale of real property] and prevent [the contract counterparty] from seeking specific performance in state court"); *In re Star Broadcasting, Inc.*, 336 B.R. 825 (Bankr. N.D. Fla. 2006) (finding bad faith where Debtor filed to avoid specific performance lawsuit in connection with the pre-petition agreement for the sale of a radio station); *In re Silberkraus*, 253 B.R. 890, 905 (Bankr. C.D. Cal. 2000) ("… Silberkraus filed bankruptcy for the purpose of delaying and defeating the pending state court specific performance action. Per *Chinichian,* it was bad faith for Debtor Silberkraus to seek to use bankruptcy to alter whatever result would have been achieved by continuing to litigate the state court action"); *In re Ravick Corporation*, 106 B.R. 834, 849 ("… Ravick Corporation's true motives in filing its Chapter 11

petition were not rehabilitative but were to utilize the bankruptcy court as a means of renegotiating the terms of its Contract with Prisand, in view of what the debtor believes to be the increased value of the property since the execution date of the Contract, and the possibility of securing a purchaser that would enhance the debtor's ultimate profit on the Property"); *In re Young*, 76 B.R. 376 (dismissing petition that the debtor filed after suffering an adverse decision in state court specific performance action).

32. *Silberkraus*, *Ravick* and *Young* are particularly instructive as they each involve debtors who were defendants in state court specific performance actions where the debtor refused to honor real estate purchase contracts.

i. The Facts Here Are Similar to Those in In re Silberkraus

33. In *In re Silberkraus*, the debtor was a defendant in pre-petition litigation commenced by the holder of an option to purchase commercial property that the debtor owned, as well as the debtor's personal residence. *In re Silberkraus*, 253 B.R. at 897. A conference was scheduled by the state court to set a trial date. *Id.*, at 897. Two days before the scheduled conference, the debtor filed a chapter 11 petition. *Id.*, at 897. The holder of the purchase option thereafter successfully moved for relief from the stay in order to continue the specific performance litigation. *Id.*, at 898. After several months in bankruptcy, the option holder moved to convert the debtor's case to chapter 7 on bad faith grounds, arguing that the case was filed to impede the specific performance action and was an exercise in forum-shopping. *Id.*, at 900. The court found that the petition had been filed in bad faith noting the following:

> In light of the facts and circumstances detailed in **Part I** supra herein, Debtor's filing and prosecution of this chapter 11 case was in bad faith. These facts include: (1) Debtor's welching on closing escrow to sell the commercial property to Coppersmith pursuant to the Coppersmith option to purchase, a mere three days before scheduled closing; (2) Debtor's filing bankruptcy – though Debtor

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> was solvent – to obstruct, delay and stay the ongoing pending state court specific performance litigation; (3) Debtor's forum shopping to try have [sic] the bankruptcy court, rather than the state court, determine the validity and enforceability of the option to purchase including Debtor's Opposition to Coppersmith's and Seeley's relief from stay motions; (4) Debtor's failure to file a first amended plan and disclosure statement, after requesting and receiving an extension of time from the court – over the objection of the creditors – to do so; and (5) Debtor's admission, at the hearing held September 5, 2000, that Debtor could not reorganize over the objections of Coppersmith and Seeley.

Id., at 902-03.

34. The court further noted that the debtor "had millions of dollars of equity in his properties" and even if the option was held to be valid and enforceable, creditors would still be paid in full. *Id.*, at 904. Citing the case of *In re Chinichian*, 784 F.2d 1440 (9th Cir. 1986), which rejected a chapter 13 plan on bad faith grounds, the *Silberkraus* court found that the debtor's balance sheet solvency and the timing of the filing of his case led to the inference that the debtor filed its bankruptcy petition "for the purpose of delaying and defeating the pending state court specific performance action." *Id.*, at 904-05. The court held that it was "bad faith for Debtor Silberkraus to seek to use bankruptcy to alter whatever result would have been achieved by continuing to litigate the state court action." *Id.*, at 905.

35. The *Silberkraus* court also noted that even if the purchase option proved to be valid and enforceable, rejection of that option contract would not allow the debtor to achieve his goal of enjoying a surplus by selling the property to another party at a higher price. *Id.*, at 908. The court reasoned as follows:

> Even if Debtor could have used Section 365 to reject the Coppersmith option to purchase, and then sold the property elsewhere at fair market value, Coppersmith would have had a damage claim from that rejection equal to the full amount debtor could have obtained, over the option price, by doing so. Per Section 365, that claim would have been a general unsecured claim. The value debtor obtained by selling the property in the open market

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> above option price, or by leasing it in the open market at an enhanced rental rate, would have been shared by all priority and general unsecured creditors (the secured creditors would have been paid from escrow). However, because there was very little unsecured debt in this case other than whatever unsecured claim Coppersmith would have had, Coppersmith, being the bulk of any general unsecured class, would have received the bulk of the proceeds above option price, by sharing pro rata with the few other general unsecured creditors.

Id., at 908.[5]

36. Here, the facts are strikingly similar to *Silberkraus*. The Debtor refused to perform on the terms of a contract for the sale of its real property; the Purchaser commenced specific performance litigation in state court; the Debtor filed days before a scheduled appearance in state court; the Debtor was not facing immediate financial pressure to seek bankruptcy protection; the Debtor could not confirm a plan over the objection of the Purchaser[6] unless, perhaps it were somehow able to obtain the consent of secured creditor Mautner-Glick (the principal of which the Debtor has impleaded as a third-party defendant in the State Court Action); and all creditors would be paid in full if the Debtor closed on the sale of the Building pursuant to the terms of the Contract. Further any surplus or excess gained by selling the Building to a third party at a higher price would equal the potential rejection damages claim that the Purchaser would have against the Debtor. Because of the vast amount of equity the Debtor holds in the Building, and because of the very limited unsecured claims pool, the Purchaser's enhanced rejection claim would be paid in full, thus depriving the Debtor of any hoped-for windfall.

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[5] Judge Gropper recognized the same issue in *In re UNED Associates, LLC*, 2007 WL 1200822, No. 07-10412 (ALG) (Bankr. S.D.N.Y. April 20, 2007) ("… if the Contract is rejected, 211 East would have a claim for damages resulting from rejection of the Original Contract that would be payable before any return to equity and might be measured by all of the Debtor's potential profits").

[6] If the Debtor were to sell the Building for $14 million, the Purchaser would have a rejection damages claim at least in the amount of $4.25 million, the difference between the sale price and the $9.75 million Contract purchase price. That rejection damages claim would make the Purchaser by far the largest general unsecured creditor, with a claim that easily would control the general unsecured creditor class.

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ii. ***The Facts Here Are Similar to Those in In re Ravick Corporation***

37. *In re Ravick Corporation* is also instructive. There, the debtor entered into a contract to sell certain development property to a purchaser. *In re Ravick Corporation*, 106 B.R. at 836. After suffering setbacks in obtaining various pre-sale required governmental approvals, the debtor tried to renegotiate the purchase price of the property. The purchaser sued in state court seeking specific performance and the debtor defended on the basis of impossibility of performance, citing the governmental setbacks. *Id.*, at 839. Following a ruling by the state court which granted partial summary judgment for specific performance and denying partial summary judgment on the debtor's impossibility defense, and two days before the parties were scheduled to appear back in court, the debtor filed a chapter 11 petition. *Id.*, at 840. Two weeks later, the debtor filed a motion seeking authorization to reject the pre-petition contract as an executory contract. *Id.*, at 841. At the same time, the debtor commenced an adversary proceeding against the purchaser seeking a bankruptcy court declaration that the debtor was excused from performance under the contract due to the impossibility of performance doctrine. *Id.*, at 841.

38. The bankruptcy court noted that the debtor had no employees except for its sole shareholder, had no cash flow, no source of income except for cash generated by disposal of portions of its real property, did not own or lease any machinery, office equipment or automobiles, did not produce any goods or services, did not maintain any inventory, had no accounts receivable and did not maintain any financial statements. *Id.*, at 847. The court further noted that at the time of the bankruptcy filing, the only legal proceeding to which the debtor was a party was the specific performance action. *Id.*, at 847. Further, the debtor only had one secured creditor and had only four other unsecured creditors, whose claims were "relatively small." *Id.*, at 847. The court also noted fact that other than a secured creditor's request for payment, "nothing in the record before

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this court indicates that at the time the petition was filed, creditors were pressing the debtor to take any action." *Id.*, at 848.

39. Based upon those circumstances, the *Ravick* court had no difficulty finding that the petition should be dismissed as having been filed in bad faith. In so doing, the court remarked:

> Most significantly, the record indicates that the debtor and/or Girard filed its chapter 11 petition in order to (1) avoid the Ravick-Prisand contract and liquidate the Property; (2) avoid personal liability on the part of Girard on the Mainstay loan and the Prisand Contract; and (3) avoid entry of an order by Judge Wells granting Prisand partial summary judgment against the debtor on the issue of specific performance on the Contract. The very timing of the petition in this case, just two days before the return date on the debtor's and Girard's motion for reconsideration in the state court action, makes the debtor's motives suspect. This court cannot sanction the debtor's use of the bankruptcy court as a litigation tactic.

Id., at 848.

40. The *Ravick* court further stated that the debtor's "plans with respect to the possible sale of the Property to potential third party buyers, based upon a successful rejection of the executory contract, bolster this court's finding that the debtor's intent behind filing its petition was to avoid the Prisand Contract and obtain enhanced profit." *Id.*, at 850.

41. Here, *all* of the factors cited by the *Ravick* court are present. It is just as clear here that the Debtor's intent in filing its bankruptcy petition was to avoid what it perceived to be a risk of an adverse decision in the State Court Action which would have compelled it to perform under the Contract. Like *Ravick*, this Debtor's removal of the State Court Action, its stated intention to "tee up the issue regarding voiding of the pre-petition [C]ontract",[7] and its negotiation of a contract with a third party to sell the Building, only serve to bolster that inevitable conclusion.

iii. ***The Facts Here Are Similar to Those in In re Young***

[7] TrICC 6:25 – 7:2.

42. The facts here are also similar to those in *In re Young*. There, like here, the debtor entered into a contract to sell real estate to a purchaser. Later, the debtor had a change of heart about selling, and the contract counterparty brought an action for specific performance. *In re Young*, 76 B.R. at 377. Following a trial, the state court awarded specific performance to the plaintiff and later denied the debtor's petition for reargument. The debtor refused to comply with the order of specific performance but the Register in Chancery signed a deed transferring the property to the plaintiff and the plaintiff tendered the purchase price, less brokerage commissions and interest, to the debtor. *Id.*, at 377. The debtor disputed the deduction for interest and returned the check to the plaintiff. Thereafter, the debtor filed a chapter 11 petition and sought to reject the purchase contract, arguing that it was still executory because the plaintiff did not tender the full purchase price. *Id.*, at 377.

43. The plaintiff moved for dismissal of the petition alleging that it was filed in bad faith. The *Young* court agreed, finding that "[t]he facts in this case demonstrate that [the debtor] filed bankruptcy in order to avoid enforcement of the Chancery Court's specific performance decree and that court's decision regarding the withholding of interest … [The debtor's] motivation for invoking the protection afforded by Chapter 11 is inconsistent with the intended purposes and policies of Chapter 11 and cannot be tolerated. Consequently, a dismissal is warranted."

44. Here, although there has not yet been a judgment of specific performance awarded in the State Court Action, the Debtor's *motivation* in filing this Case is exactly the same. Like *Young*, the Debtor here filed its petition in order to avoid an existing adverse ruling in a specific performance case. In *Young*, it was the judgment. Here, it is the TRO and the likely ruling in favor of the Purchaser on the OSC. Just like *Young*, that motivation constitutes bad faith and the Case must be dismissed.

b. The Case Was Filed In Order To Reject An Executory Contract

45. Courts have also found bad faith where a bankruptcy petition was filed in order to reject an executory contract. *See*, *Advanced Restoration Technologies, Inc. v. Shortgrass, Inc. (In re Advanced Restoration Technologies, Inc.)*, 2006 WL 827841, No. Civ.A. 05-2978 (JLL) (March 30, 2006, D. N.J.) (affirming bankruptcy court's dismissal of petition on bad faith grounds where primary purpose was to reject a marketing agreement); *In re Watkins*, 210 B.R. 394, 403 (Bankr. N.D. Ga. 1997) ("This court agrees that where the *sole* objective of a solvent debtor is to reject a contract in favor of a better one, the petition is in bad faith as it serves no useful reorganization purpose."); *In re Sammons*, 210 B.R. 197, 199 (Bankr. N.D. Fla. 1997) ("I find that the debtor is not in real financial distress, and his only purpose for commencing a case under Chapter 7 was to avoid the contract with SMA in order to sign what he perceived to be a more lucrative contract with Square Ring, Inc. I find this to be an abuse of the bankruptcy process"). Here, the Debtor has admitted that it will shortly "tee up the issue regarding voiding of the pre-petition [C]ontract" thus leading to the inference that rejection of the Contract was the Debtor's motivation in filing this Case. That motivation constitutes bad faith.

c. **The Case Was Filed In an Effort to Forum Shop**

46. Courts have routinely held that bad faith litigation tactics include forum shopping. *See In re Y.J. Sons & Co., Inc.*, 212 B.R. at 804) (affirming dismissal of case where debtor "had, in essence, forum shopped not being satisfied with the results of the action that was before the Superior Court [and sought] a second bite of the apple"); *In re MacInnis,* 235 B.R. 255 (S.D.N.Y. 1998) (reversing bankruptcy court's denial of motion to dismiss on bad faith grounds where debtor filed bankruptcy petition as a result of a preliminary order of attachment entered against him in state court); *In re Reyes*, 2015 Bankr. LEXIS 2575 at *15 - *16 ("Here, the debtor filed the

bankruptcy case solely as a litigation tactic to try the dispute in a forum he deemed more favorable").

47. Here, the Debtor admits that the bankruptcy filing was the "result of"[8] and "related to"[9] the State Court Action. Indeed, in response to the Court's inquiry as to whether the Case is "just about the contract dispute", the Debtor's counsel replied "The contract – well, the contract dispute is the – I guess what has brought us here, Your Honor."[10] There was also no financial pressure being applied to the Debtor which, in any event, was not operating. Moreover, the Debtor has now filed the Notice of Removal to litigate the State Court Action before this Court. The only fair conclusion under such circumstances is that the Debtor preferred to litigate its dispute with the Purchaser in this Court. That, however, is bad faith and cause to dismiss the Case.

d. **The Case Was Filed In Order To Avoid the TRO**

48. Bad faith is similarly found where a debtor files its bankruptcy in order to avoid state court injunctions. *In re Edwards*, 140 B.R. 515, 517-18 (Bankr. W.D. Mo. 1992) ("… the bankruptcy was filed for the purpose of circumventing an injunction against actions which the state court has determined are wrongful and constitute misappropriation of Superior's property. Such a purpose indicates bad faith in filing the Chapter 11 case"). Here, the TRO was issued by the State Court which enjoined the Debtor from "taking any steps and/or actions to sell the premises." The Debtor has since taken steps and actions to sell the Building to a third party for $14 million. Thus, it is manifest that the Debtor sought to avoid the TRO by filing this Case.

e. **The Debtor Was Under No Financial Pressure to File the Case**

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[8] 1007-2 Affidavit, ¶ 3; TrICC 6:9 – 6:17.

[9] TrICC 10:15 – 11:2.

[10] TrICC 12:13 – 12:16

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49. Courts have also found bad faith where a debtor, not facing any imminent financial pressure, prematurely files a bankruptcy case in advance of an *anticipated* adverse decision. *See SGL Carbon Corp.*, 200 F.3d at 166 ("Courts, therefore, have consistently dismissed Chapter 11 petitions filed by financially healthy companies with no need to reorganize under the protection of Chapter 11"); *In re Schur Management Co., Ltd.*, 323 B.R. 123, 127 (Bankr. S.D.N.Y. 2005) ("The Debtors here, like the debtor in *SGL Carbon*, have no present need to file, only the 'mere possibility of a future need to file.' … They do not need a litigation respite, as do many Chapter 11 debtors").

50. Like the debtors in *SGL Carbon and Schur Management,* the Debtor here was not facing financial pressures which necessitated a filing. Nor did it need a litigation respite to focus on its business. It was not operating. The only litigation that it was involved in was the State Court Action. Its only asset is the Building and, as a non-profit religious corporation, it is not subject to real estate taxes. Further, it was not incurring any expenses as the Building had been gutted and the utilities have all been shut off. Thus, at best, the filing of the Debtor's chapter 11 petition was premature. The Contract purchase price will generate more than enough proceeds to pay all creditors in full and the Debtor simply has no need to reorganize at the present time.

B. Application of the *C-TC* Factors Favors Dismissal

51. The Second Circuit Court of Appeals has found the following eight factors to be indicative of a bad faith filing giving rise to "cause" for dismissal:

a. The debtor has only one asset;

b. The debtor has few unsecured creditors whose claims are small in relation to those of the secured creditors;

c. The debtor's one asset is the subject of a foreclosure action as a result of arrearages or default on the debt;

d. The debtor's financial condition is, in essence, a two-party dispute between the debtor and secured creditors which can be resolved in a pending state court action;

e. The timing of the debtor's filing evidences an intent to delay or frustrate the legitimate efforts of the debtor's secured creditors to enforce their rights;

f. The debtor has little or no cash flow;

g. The debtor cannot meet current expenses including the payment of personal property and real estate taxes; and

h. The debtor has no employees.

See In re C-TC 9th Ave. Partnership, 113 F.3d at 1311; *see also, In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393, 1394-95 (11th Cir. 1988); *In re Kaplan Breslaw Ash, LLC*, 264 B.R. 309 (Bankr. S.D.N.Y. 2001); *In re 234-6 West 22nd St. Corp.*, 214 B.R. 751, 760 (Bankr. S.D.N.Y. 1997).

52. The Second Circuit has further held "[w]hen it is clear that, from the date of filing, the debtor has no reasonable probability of emerging from the bankruptcy proceedings and no realistic chance of reorganizing, then the Chapter 11 petition may be frivolous. . . . '[T]he debtor must have some intention of reorganizing.'" *In re C-TC 9th Ave. Partnership,* 113 F.3d at1310 (quoting *In re Cohoes Indus. Terminal, Inc.*, 931 F.2d 222, 227 (2d Cir. 1991)).

53. All of the *C-TC* factors are present here: (i) the Building is the Debtor's only asset; (ii) the Debtor has very few unsecured creditors which, with the exception of Fairway's "Johnny-come-lately" $250,000 claim, aggregate only $12,502.39; (iii) the Case is really nothing more than a two-party dispute between the Debtor and the Purchaser as there exists more than sufficient equity in the Building to pay all creditors in full and the Debtor was not experiencing any financial pressure to seek bankruptcy protection; (iv) the timing of the Debtor's bankruptcy filing (four days before it was to appear in State Court for the hearing to consider the Order to Show Cause) evidences an intent to frustrate and hinder the Purchaser's rights to specific performance of the Contract; (v) the Debtor does not operate and has no cash flow whatsoever; (vii) there are no projected cash flows but the Debtor, a religious corporation, incurs no real estate tax liability on

the Building, does not have utilities hooked up and, with the exception of the dubious "salaries" paid to the Directors and professional fees incurred in this Case, has no projected expenses; and (vi) the Debtor has no employees. Accordingly, all of the *C-TC* factors point to a finding of bad faith.

C. All Four *Syndicom* Factors are also Present Here

54. Judge Gerber, in *In re Syndicom Corp.*, 268 B.R. 26 (Bankr. S.D.N.Y. 2001), identified four other factors that supported its holding that bad faith was present:

> a. The case was filed as a tactical step in connection with the Debtor's state court battles with [the moving creditor], and with the purpose of securing a tactical advantage in the Debtor's battles with [the moving creditor].
>
> b. There [was] no showing of any financial pressure on the Debtor on the part of creditors other than the counter-party, [moving creditor], to the two-party dispute, or of financial distress as a consequence of other creditors' claims.
>
> c. Unsecured creditors would not benefit in any material way from the Debtor's filing, and would not be prejudiced in any material way as a result of relief from the stay.
>
> d. … the case was filed with both the purpose and effect of securing benefits for nondebtor individuals … - continued occupancy of the Apartment and the profit on the "flipping" of the Apartment – in contrast to securing benefits for the Debtor corporation, which, as previously noted, has no ongoing business, and no intention to continue in business.

Id. at 51-2 (factors re-numbered here).

55. Here, all of the four *Syndicom* factors are present: (1) as set forth above, the Case was filed as a tactical step to remove the State Court Action to this Court, reject the Contract that is the subject of that action, and sell the Building to a third party purchaser; (2) the Debtor has few creditors, most of whom hold *de minimis* claims and the Debtor has not asserted that it faced any financial pressure whatsoever by any of its creditors, instead justifying the filing solely on the State

Court Action; (3) due to the significant equity that the Debtor has in the Building, general unsecured creditors will be paid in full whether the Building is sold outside of bankruptcy to the Purchaser, or inside bankruptcy to a third party; and (4) the Case was filed, in part, with the purpose of benefitting the individual Directors through the payment of an undeserved monthly salary.

D. The Case Was Commenced For the Benefit of Insiders

56. Based upon all of the foregoing, the Purchaser respectfully submits that the Debtor's petition was filed in bad faith and should be dismissed. Nevertheless, as an additional ground, there is evidence that the filing of the Case was orchestrated by Fairway and that the Case is being run solely for the benefit of Fairway and the Insiders.

57. As set forth above, Fairway is a firm that opportunistically purchases real estate assets. In January, 2016, shortly before the filing of the Debtor's petition, Fairway, through newly-created 69th Street Capital LLC,[11] provided the Debtor with a $250,000 interest-free unsecured loan (Tr341 21:8 – 22:12, 23:3 – 23:6).

58. At the Debtor's section 341 meeting held on February 22, 2016, the Director Harold Friedlander described Fairway as "[t]hose are the folks that are dealing with the situation to help us. In other words, they're – they're the – the whole makeup of lawyers, of …" (Tr341 19:14 – 19:22).

59. Indeed, as the following sworn testimony from the 341 meeting reveals, Steve Rosenbloom[12] and Matt Teichman of Fairway assembled the Debtor's legal team:

> Q. Did you enter into an engagement letter with the Hanson Law Firm?
> A. I don't think so. I think Mr. Teichman did, Mr. – my – my brother, Matt Teichman – Teichman. [Mr. Teichman is an employee of Fairway]
> Q. Okay. Is he an officer of the Congregation?
> A. No.

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[11] Attached hereto as **Exhibit "O"** is a printout from the NYS Department of State showing that 69th Street Capital LLC was formed on December 23, 2015.

[12] Upon information and belief, Fairway's Managing Partner is named Steven Rosenberg, not Steven Rosenbloom.

Q. Is he a director of the Congregation?
A. No.
Q. Does he have any power to bind the Congregation by signing anything?
A. No. But again, I'm not sure. I –
Q. How did you – who introduced you to the Hanson Law Firm?
A. Steve Rosenbloom and Mr. Teichman.
Q. Okay. Do you know whether they use the Hanson Law Firm as their counsel?
A. I don't know.
Q. Okay. Who introduced you to the Robinson Brog law firm?
A. Also, Mr. Rosenbloom and Teichman.

Tr341 63:3 - 63:25.

60. Further, it appears that to the extent that there exists an appraisal that gave rise to the Debtor's scheduled valuation of $18 million for the Building, Mr. Friedlander testified that it was Mr. Teichman, and not the Debtor, that commissioned that appraisal (Tr341 87:3 – 88:6).

61. Despite the fact that the Debtor does not operate and therefore has a simple financial structure, Mr. Friedlander displayed little knowledge of the Debtor's finances and appears to rely on Fairway to handle the Debtor's financial affairs:

Q. By the way, where did the other funds come from, the $55,000; where did that come from to pay Robinson Brog?
A. I believe Mr. Rosenbloom took care of that.
Q. He took care of that?
A. Yes.
Q. Okay. And how did he do that?
A. I don't know.
Q. You don't know?
A. I – I think he raised money from his people, so to speak, from his associates.
Q. Okay.
A. Yeah.
Q. And then what did he do with the money?
A. I don't know.
Q. Did you ever pay Robinson Brog?
A. No.
Q. All right. Did you enter into an agreement with Robinson Brog, an engagement letter?
MR. YEE: There's a retainer
A. A retainer.
Q. A retainer?
A. Yeah.

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Q. Okay. If you didn't pay Robinson Brog, who paid Robinson Brog?
A. Well, it was under - -- it was an understanding that, at the end of the case, when the case was expired, hopefully, then we would pay the whole thing.
Q. Okay. But the 55 – in the engagement letter, there was $55,000 that was paid to Robinson Brog?
A. Right.
Q. Who paid the – the 55 –
A. I don't know. I don't know.
Q. But it wasn't you?
A. No, it wasn't me.
Q. Could it have been your sister?
MR. YEE: No.
A. No.
Q. Okay.
MR. OREL: Was it the Congregation?
MR. YEE: No, the –
MR. FRIEDLANDER: No, the Congregation has no money.
MR. YEE: The Congregation paid – the money was funded into the Congregation's bank account and paid on behalf of the Congregation to Robinson Brog.

Tr341 57:16 – 59:19.

62. Fairway, or its employees, also made personal loans or gifts to the Directors prior to the filing of the Case. Those loans appear to have gone through the Debtor's Fairway-selected counsel, the Hansen Law Firm:

A. Well, my – my – my brother-in-law's company, it's not really his company, it's Steven Rosenbloom.
Q. Um-hmm.
A. Has lent us more money that's not reflected in this; personal loan.
MR. YEE: Is this on Hanson's escrow?
MR. FRIEDLANDER: I believe so, yeah.

Tr341 27:7 – 27:16.

63. Mr. Friedlander testified that the purpose of the $250,000 interest-free unsecured loan made by Fairway to the Debtor was, in part, to pay the Directors' living expenses:

Q. What was the loan for?
A. It was for living expenses and – because we're – we – I don't currently have a job. My job was at the synagogue, and the synagogue is no longer functioning, at this time.

Q. Um-hmm.
A. And my sister –
MR. YEE: The loan is basically to fund the operations of the synagogue while it's running
MR. VELEZ-RIVERA: The synagogue has no operations, so let Mr. Friedlander continue.
A. Yeah, my sister also was – her husband was working at the synagogue also, part time. And he was told to move to Queens from – which was a – it's higher income bracket, higher tax bracket, the schools cost more, the Yeshiva, the – the religious school costs more.
Q. Perfectly understood.
A. And so they – they got themselves in debt.
Q. Okay.
A. So they needed a loan
MR. YEE: But everyone is working for the Debtor.
MR. FRIEDLANDER: Yeah.
MR. YEE: I mean, it's not operating right now, but they're working on sort of continuing the operations of the Congregation.
MR. VELEZ-RIVERA: Hold on.
BY MR. VELEZ-RIVERA: Okay. So the $250,000 –
A. Mm-hmm.
Q. -- how – where did it go?
A. DIP account.
Q. Okay. We'll get to that in a minute. Okay, all right.
A. And we each get 7,500 a month. "We," meaning I get and my sister gets 7,500 also.

Tr341 23:7 – 24:25.

64. Mr. Friedlander justified the salary payments for the "no-show" positions of he and his sister because they personally owe a lot of money:

Q. Why – can you tell me why it is – you think it's appropriate to be taking $7,500 a month for yourself and another 7,500 for your sister now?
A. We owe a ton of money because we weren't making money.
Q. "We" being?
A. Well, me and my sister separate – well, forget –
MR. YEE: I mean, I think, now, post petition you're perfor – you weren't really performing services for the Congregation beforehand; right? Now that they're trying to start things up again and get things going, you and your sister are significantly more involved than they were before?
MR. FRIEDLANDER: That's true too, but – yeah, but we – we really owe a lot of money that we have to pay back.
BY MR. OREL:
Q. The "we" being yourself or the – or the Congregation?

A. Me and my wife, me and my wife. Not the Congregation.
Q. Okay. And you owe this money for what?
MR. YEE: These aren't Congregation debts; these are –
MR. FRIEDLANDER: No, these are just personal debts.
Q. Personal debts?
A. Yeah.
Q. Okay.
A. Because – yeah. Because we were living on my wife's salary, and my wife wasn't making that much.

Tr341 90:19 – 92:6.

65. Prior to the filing of the bankruptcy Case, Mr. Friedlander had not received any salary or payments from the Debtor since at least January, 2014, and at that time he was earning approximately $450.00 per week (See Tr341 89:11 – 89:23). Accordingly, the commencement of this Case has enabled Mr. Friedlander to more than quadruple the salary he received when he actually performed services for the Debtor two years ago. It is not known whether Ms. Kreger had previously received a salary or, if so, the amount of that salary.

66. Mr. Friedlander denied that Fairway had any interest in purchasing the Building. Instead, according to Mr. Friedlander, Fairway created a new special purpose entity, provided the Debtor with a $250,000 interest-free unsecured loan through that entity, provided personal loans or gifts to Mr. Friedlander and his sister, commissioned an appraisal of the Building, assembled and funded a legal team for the Debtors, all without any expectation of profiting from the sale of the Building, other than getting its $250,000 back:

> A. … And we met with Steve Rosenbloom and Matt Teichman, Matt, my brother-in-law, and they decided to – we simply had no money to live on. And so he said, out of the goodness of his heart, he's – he's going to loan us the money and provide – and provide us with financial –

Tr341 37:24 – 38:5.

67. It is respectfully submitted that it makes no economic sense whatsoever for Fairway to make an interest-free unsecured loan to the Debtors to pay the Directors' living expenses and to

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fund the Debtor's Fairway-selected legal team without any expectation of profiting from the sale of the Building.[13] Further, from the foregoing testimony, it is clear that the Directors' intent in filing the Case was to obtain cash flow for their living expenses. The side agendas of the people and entities that control the Debtor are further evidence of bad faith for which dismissal is required.

B. ABSTENTION OF THE STATE COURT ACTION IS MANDATED

68. This Court must abstain from hearing the Adversary Proceeding pursuant to 28 U.S.C. § 1334(c)(2). That section provides as follows:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(c)(2).

69. Abstention is mandatory under 28 U.S.C. § 1334(c)(2) when six elements are found:

> (1) the motion to abstain [was] timely; (2) the action is based on a state law claim; (3) the action is "related to" but not "arising in" a bankruptcy case or arising under the Bankruptcy Code; (4) Section 1334 provides the sole basis for federal jurisdiction; (5) an action is commenced in state court; and (6) that action can be timely adjudicated in state court.

In re WorldCom, Inc. Sec. Litig., 294 B.R. 553, 556 (S.D.N.Y.2003*) aff'd sub nom. Cal. Pub. Employees' Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86 (2d Cir.2004);

70. Here, the Notice of Removal was only filed on March 4, 2016. Accordingly, the request for mandatory abstention is timely.

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[13] If Fairview's motivation was strictly altruistic, it could have instead made a tax-free donation to this non-profit Debtor.

71. The second element is also met. All claims in the State Court Action are state-law based. There is no federal statute or federal question of law implicated by any of the Claims.

72. Critically, this case is not a "core proceeding." In order to be "core", the proceeding must arise under title 11 or arise in a case under title 11. A proceeding "arises under" title 11 if it "invokes substantive rights created by bankruptcy law." *U.S. Dep't of Labor v. Kirschenbaum, 508 B.R. 257, 264 (E.D.N.Y. 2014)* (quoting *In re Housecraft Indus. USA, Inc., 310 F.3d 64, 70 (2d Cir. 2002)*. Here, there is no argument that the Debtor can credibly make that any of the state law claims in the State Court Action invoke substantive rights created by bankruptcy law. Thus, the State Court Action does not "arise under" title 11.

73. A proceeding "arises in" title 11 when "it would have no existence outside of the bankruptcy." *Baker v. Simpson, 613 F.3d 346, 350-51 (2d Cir. 2010)* (internal quotation marks omitted); *see also In re New 118th LLC, 396 B.R. 885, 890 (Bankr. S.D.N.Y. 2008)* ("Generally, a core proceeding is one that invokes a substantive right under title 11, or could only arise in the context of a bankruptcy case."). Here, all of the claims in the State Court Action are based on state law and, accordingly, would exist outside of bankruptcy. Because the claims in the State Court Action neither arise under nor arise in a case under title 11, the State Court Action is not a "core" proceeding. The third mandatory abstention factor is therefore met.

74. The sole basis for jurisdiction of the State Court Action in a federal court is Section 1334. There is no diversity and no federal question presented. Thus, the fourth element for mandatory abstention is also met

75. Although the State Court Action was removed to federal court pursuant to the Removal Notice, there still remains a state court action that was "commenced in state court", thus

satisfying the fifth element. It is now well-established that mandatory abstention is applicable to removed cases. *See Mt. McKinley Ins. Co v. Corning*, 399 F.3d 436, 446-47 (2d Cir. 2005).

76. Lastly, there is no reason to believe that the action could not be timely adjudicated in State Court. The Second Circuit has set forth four factors to consider in determining timely adjudication: (1) the backlog of the state court's calendar relative to the federal court's calendar; (2) the complexity of the issues presented and the respective expertise of each forum; (3) the status of the title 11 bankruptcy proceeding to which the state law claims are related; and (4) whether the state court proceeding would prolong the administration or liquidation of the estate. *Parmalat Capital Finance Ltd. V. Bank of America Corp.,* 639 F.3d 572, 580 (2d Cir. 2011).

77. The *Parmalat* Court left open the issue of which party bore the burden of establishing the timely adjudication requirement, but hinted that the burden may be on the party opposing mandatory abstention. *Id.*, at 582 ("Placing the burden on the party seeking remand may nevertheless be inconsistent with the mandatory nature of abstention under § 1334(c)(2) as well as the principles of comity, which presume that a state court will operate efficiently and effectively. Accordingly, when examining this issue, the district court should consider these significant competing concerns"). District courts that have since considered the issue have placed the burden on the party opposing abstention. *See, Credit Suisse AG v. Appaloosa Inv. Ltd. Partnership I,* 2015 WL 5257003 at *12, No. 15-cv-3474 (SAS) (S.D.N.Y., September 9, 2015) ("… particularly in the context of removal, where any doubts are to be resolved against removability, the burden should be on defendants to prove that the state court *cannot* adjudicate the claims in a timely manner"); *BGC Partners, Inc. v. Avison Young (Canada), Inc.*, 919 F.Supp.2d 310, n. 66 (S.D.N.Y. 2013) (same); *Tronox Inc. v. Kerr-McGee refining Corp. (In re Tronox Inc.),* 2011 WL 482724, *4, No. 09-10156 (ALG), Adv. Proc. No. 09-01537 (ALG) (Feb. 4, 2011, Bankr. S.D.N.Y.) ("The

party opposing remand bears the burden to show that these matters cannot be timely adjudicated in state court) (internal quotations omitted).

78. Here, there has not been any suggestion that the State Court's calendar was backlogged. Indeed, the parties were scheduled for a hearing which could have almost completely disposed of the matter in January. Were it not for the Debtor's tactical bankruptcy filing, the State Court may have already made a decision on whether the Debtor was required to seek approval of the State Court or the NYAG's office for the sale of the Building under the Contract.

79. While the issues do not appear to be overly complex, they do involve real property law and specific performance under New York State law. The State Court possesses particular expertise in those areas of state law.

80. The status of the bankruptcy proceedings strongly favors abstention. This Case, which was commenced in order to remove the State Court Action to this Court as a litigation tactic, has only just begun. The Debtor is not operating and there is no business to oversee in chapter 11.

81. Lastly, adjudicating the State Court Action in State Court would not prolong the administration of this estate. As set forth above, there is nothing to administer in this Case. The State Court Action is the only substantive moving part in this Case so far. Accordingly, the *Parmalat* requirements for timely adjudication are satisfied here.

82. For all of the foregoing reasons, mandatory abstention is required and the State Court Action should be remanded to State Court.

C. EVEN IF MANDATORY ABSTENTION WERE NOT REQUIRED, DISCRETIONARY ABSTENTION IS APPROPRIATE AND WARRANTED

83. Alternatively, in the event that the Court finds mandatory abstention is not required, discretionary abstention, pursuant to 28 U.S.C. § 1334(c)(1), is appropriate and warranted. That section provides as follows:

> Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1334(c)(1).

84. Bankruptcy courts in this district have utilized the following 12 factors in examining whether discretionary abstention is appropriate:

> 1. The effect or lack thereof on the efficient administration of the bankruptcy estate if the court recommends abstention;
>
> 2. The extent to which issues of non-bankruptcy law predominate over bankruptcy issues;
>
> 3. The difficulty or unsettled nature of the applicable non-bankruptcy law;
>
> 4. The presence of a related proceeding commenced in state court or other non-bankruptcy court;
>
> 5. The jurisdictional basis, if any, other than 28 U.S.C. § 1334;
>
> 6. The degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
>
> 7. The substance rather than form of an asserted "core" proceeding;
>
> 8. The feasibility of severing non-bankruptcy law claims from core bankruptcy matters to allow judgments to be entered in non-bankruptcy court with enforcement left to the bankruptcy court;
>
> 9. The burden of the bankruptcy court's docket;
>
> 10. The likelihood that the commencement of the proceeding in a bankruptcy court involves forum shopping by one of the parties;
>
> 11. The existence of a right to a jury trial; and
>
> 12. The presence in the proceeding of nondebtor parties.

In re Motors Liquidation Co., 522 B.R. 13, 20 (Bankr. S.D.N.Y. 2014); *In re Portrait Corp. of Am., Inc.*, 406 B.R. 637, 641-42 (Bankr. S.D.N.Y. 2009).

85. Here, abstention would have little effect on the efficient administration of the Debtor's estate. As set forth above, this Debtor has no operations and there is nothing for this Court to administer. Moreover, no matter who buys the Building and at what price, subsequent approval of the State Court or the NYAG is required to consummate any sale. *See*, *11 U.S.C. § 363(d)(1).* Thus, no matter the outcome, State Court litigation is inevitable. Abstention, therefore, would have little, if any, practical effect on the administration of the bankruptcy estate.

86. There are no issues of bankruptcy law present. The second factor, therefore, also favors abstention.

87. The third factor also favors abstention. All issues involve somewhat complex state real property and specific performance law. Although specific performance of real property contracts is not an issue typically faced by bankruptcy courts, the issues are not uncommon to the State Court which has a special expertise in dealing with such disputes.

88. The State Court Action was commenced in State Court and remained there until the Debtor's filing of the Notice of Removal on or about March 4, 2016. Thus, the fourth factor weighs in favor of abstention.

89. The fifth factor also weighs in favor of abstention as the only basis for federal jurisdiction is 28 U.S.C. § 1334.

90. The State Court Action is only related to the Bankruptcy Case because it affects the Building which is the Debtor's only asset. However, because the Debtor has no operations to administer in the Case, as a practical matter, the State Court Action's relatedness to the Case is slight. The sixth factor, therefore, favors abstention.

91. The Notice of Removal states that the State Court Action is "core." However, as set forth above, the matter is decidedly non-core. The State Court Action involves nothing but

state law issues of law and in no way is it remotely core. At best, the litigation could have a conceivable effect on the bankruptcy estate because it involves the Debtor's Building. That, however, does not make it core. Accordingly, the seventh factor weighs in favor of abstention.

92. There are no core bankruptcy issues to sever from non-core state law issues. All of the issues present are state law real property and specific performance issues. The eighth factor, therefore, points to abstention.

93. The ninth factor is the burden on this Court's docket. The Purchaser does not have knowledge of the current status of this Court's calendar.

94. As set forth above, the commencement of the Case and subsequent filing of the Notice of Removal is a clear-cut case of forum shopping by the Debtor. The tenth factor, therefore, weighs heavily in support of abstention.

95. It does not appear that a trial by jury of the State Court Action has been demanded.

96. There are five third-party defendants that were impleaded into the State Court Action by the Debtor. Three of those third-party defendants are not scheduled by the Debtor as creditors in this Case. The Purchaser is also a non-debtor party.

97. Given the overwhelming number of factors that weigh in favor of abstention, discretionary abstention is indeed appropriate.

D. EQUITABLE REMAND IS WARRANTED

98. Equitable remand of the State Court Action back to State Court, pursuant to 28 U.S.C. § 1452(b), is also warranted. That section provides, in relevant part, that "[t]he court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground."

99. Courts in this jurisdiction consider the following seven factors in determining whether equitable remand is appropriate: (1) the effect on the efficient administration of the

bankruptcy estate; (2) the extent to which issues of state law predominate; (3) the difficulty or unsettled nature of the applicable state law; (4) comity; (5) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (6) the existence of the rights to a jury trial; and (7) prejudice to the involuntarily removed defendants. *Drexel Burnham Lambert Group, Inc. v. Vigilant Insurance Company*, 130 B.R. 405, 407 (S.D.N.Y. 1991).

100. With the exception of the fourth factor, comity, all of the *Drexel Burnham* equitable remand factors are also included in the factors for discretionary abstention, as set forth above.

101. The comity factor "focuses on the state's interest in developing its law and applying its law to its citizens." *Renaissance Cosmetics, Inc. v. Development Specialists Inc.*, 277 B.R. 5, 16 (S.D.N.Y. 2002). The Purchaser respectfully submits that New York State has a significant interest in developing and applying its own real property and specific performance law and, therefore, the consideration of comity weighs in favor of equitable remand.

102. Because application of the *Drexel* factors to the State Court Action weigh in favor of equitable remand, the Purchaser respectfully requests that the State Court Action be remanded to the State Court.

103. Further, as a matter of equity, the bad faith outlined above also strongly supports the equitable remand of the State Court Action to State Court.

CONCLUSION

104. For all of the reasons set forth above, the Purchaser respectfully submits that bad faith exists and respectfully requests that the Court dismiss this Case. The Purchaser further respectfully requests that mandatory abstention, discretionary abstention and/or equitable remand are appropriate and that the State Court Action should be remanded to the State Court. Lastly, the

Purchaser respectfully requests such other and further relief as this Court may deem just and proper.

Dated: New York, New York
March 17, 2016

COZEN O'CONNOR

By: */s/ Frederick E. Schmidt, Jr.*

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